APPENDIX A.

Order Denying Rehearing and Granting Certification.

Appellate Department of the Superior Court of the State of California for the County of Los Angeles.

People of the State of California, Plaintiff and Respondent, vs. Samuel Ratner, Defendant and Appellant.

Superior Court No. CR A 7261. Trial Court No. M35295.

The petition of appellant for a rehearing after judgment of this court on appeal and petition for certification of cause to the Court of Appeal, in the above-entitled case, having been filed and having been duly considered,

The petition for rehearing is hereby denied;

The petition for certification of cause to the Court of Appeal is hereby granted.

Dated July 6, 1967.

BY THE COURT,
Aiso
Presiding Judge
MEYER
Judge
WHYTE
Judge

Order Certifying Cause to Court of Appeal.

Appellate Department of the Superior Court of the State of California for the County of Los Angeles.

People of the State of California, Plaintiff and Respondent, vs. Samuel Ratner, Defendant and Appellant.

Superior Court No. CR A 7261. Trial Court No. N35295.

Pursuant to the applicable provisions of Rule 63, California Rules of Court, and appellant's (defendant's) timely application, we certify that the transfer of the above-entitled case to the Court of Appeal appears necessary to settle important questions of law and to secure uniformity of decision. The questions are:

1. Are the booklet "Bondage Cabin" (subject matter of Count I) and the film "The Count (subject matter of Count II) constitutionally protected under the 1st and 14th Amendments to the United States Constitution, or are the matters or either of them obscene?

2. Under Count III (violation of Penal Code §311.5) must the materials advertised themselves be obscene?

By this court's judgment entered June 8, 1967, affirming without opinion the judgment of conviction on all three counts charged, we held the matters in both Counts I and II to be obscene, the proof in our opinion fully meeting the requirements of *Mishkin v. New York* (1966) 383 U.S. 502; *Ginzburg v. United States*

(1966) 383 U.S. 463; and *United States v. Klaw* (2d Cir., 1965) 350 F.2d 155; and on Count III that the materials advertised need not in fact be obscene as long as they are represented or held out to be obscene, following this court's holding in *People v. Tierney* (1967) CR.A. 6922.

Dated July 6, 1967.

BY THE COURT.

AISO
Presiding Judge

MEYER
Judge

WHYTE
Judge

APPENDIX B.

Appellate Department

Superior Court, Los Angeles County, California

No. CR A 7261

People vs. Ratner.

Judgment in the above entitled appeal is affirmed. Judgment filed.

Dated June 8, 1967.

WILLIAM G. SHARP, County Clerk and Clerk of the Superior Court of the State of California for the County of Los Angeles

By J. MacGregor—Deputy

APPENDIX C.

On Appeal—Criminal.

Superior Court of the State of California, for the County of Los Angeles, Appellate Department.

People of the State of California, Plaintiff and Respondent, vs. Samuel Ratner, Defendant and Appellant. No. CR A 7261.

1. Petition for Rehearing.

2. Application for Certification to the District Court of Appeals.

3. Points and Authorities in Support of Petition for Rehearing and Application for Certification to the District Court of Appeals.

4. Declaration of Burton C. Jacobson in Support of Petition for Rehearing and Application for Certification to the District Court of Appeals.

PETITION FOR REHEARING

To the Honorable Judges of the Appellate Department in the Superior Court of the State of California, For the County of Los Angeles:

Defendant and appellant, SAM RATNER, presents his petition for a rehearing of the above cause, and in support thereof, respectfully shows:

1. The appeal in the cause was argued before this court on May 25, 1967.

2. On June 8, 1967, this court rendered its decision in favor of the plaintiff and respondent and against the defendant and appellant, confirming the judgment of the Municipal Court, El Monte Judicial District, County of Los Angeles, State of California.

3. The defendant and appellant seek a rehearing upon the following grounds:

a. This court erred by applying an incorrect test of obscenity.

b. This court erred in finding the material herein to be obscene and to be hard core pornography.

c. This court erred in finding a corpus delecti had been established.

d. This court erred in finding that no prejudicial error had occurred in the questioning of Dr. Crahan by the prosecution.

For the foregoing reasons, it is urged that this petition be granted.

Dated: June 14, 1967.

Respectfully submitted,

ATKINS & JACOBSON
By Burton C. Jacobson
Attorneys for Defendant and
Appellant.

APPLICATION FOR CERTIFICATION TO THE DISTRICT COURT OF APPEALS

To the Honorable Judges of the Appellate Department of the Superior Court of the State of California, County of Los Angeles:

Defendant and appellant, SAM RATNER, presents this application for certification to the District Court of Appeals of the above cause upon the following grounds:

a) The transfer of the instant case is necessary to secure uniformity of decision in that this Court's affirming decision filed June 8, 1967 is contrary to the law of the State of California as expressed in *Zeitlin v. Arnebergh,* 59 Cal. 2d 901; is contrary to the test of obscenity as contained in the Penal Code of the State of California, §311 (a); and is contrary to the law of the United States of America as expressed in *Roth v. United States,* 354 U.S. 476; *One, Inc v. Olesen,* 355 U.S. 371; *Times Film Corp. v. Chicago,* 355 U.S. 35; *Sunshine Book Co. v. Summerfield,* 355 U.S. 372; *Kingsley International Pictures Corp. v. Regents,* 360 U.S. 684; *Manual Enterprises, Inc. v. Day,* 370 U.S. 478; *Jacobellis v. Ohio,* 84 S. Ct. 1676; *Tralins v. Gerstein,* 84 S. Ct. 1903; *Grove Press v. Gerstein,* 84 S.Ct. 190; *Winters v. New York,* 68 S.Ct. 665, and *Burstyn, Inc. v. Wilson,* 72 S. Ct. 777.

b) To settle important questions of law involving the constitutional guarantees of freedom of speech and expression as contained in the United States Constitu-

tion, First and Fourteenth Amendments and the California Constitution, Article One §9.

(1) Under the rule of law laid down in *Zeitlin v. Arnebergh,* 59 Cal. 2d 901, that only "hard core pornography" is proscribed, what material is embraced within the term "hard core pornography"?

(2) Does the material involved herein fall within the definition of the phrase "hard core pornography"?

(3) What is the proper method of application of the definition of obscenity as contained in §311 (a) of the Penal Code of the State of California?

For the foregoing reasons, it is urged that this application be granted.

Dated: June 14, 1967.

Respectfully submitted,

ATKINS & JACOBSON

By Burton C. Jacobson

Attorneys for Defendant and Appellant.

POINTS AND AUTHORITIES IN SUPPORT OF PETITION FOR REHEARING AND IN SUPPORT OF APPLICATION FOR CERTIFICATION TO DISTRICT COURT OF APPEALS.

I.

THIS COURT ERRED IN AFFIRMING APPELLANT'S CONVICTION IN THE INSTANT CASE.

Before any material may be legally proscribed or suppressed *all* of the various elements contained in the definition of obscenity must coalesce and be met. These elements are as follows:

1) The material must be tested by "the average person".

2) The average person must test the material by applying "contemporary standards".

3) The material must be tested by its "predominant appeal".

4) The predominant appeal of the material must be "taken as a whole" and not part by part.

5) The said predominant appeal of the material taken as a whole must be to "prurient interest" as defined in §311 (a) of the Penal Code of the State of California.

6) The description or representation of such matter must go "substantially beyond customary limits of candor".

7) Last but not least, the matter must also be *utterly* without redeeming social importance.

If the material under consideration does not meet *all* of these elements then that materia may not be declared obscene and proscribed.

Roth v. United States, 354 U.S. 476; *Manual Enterprises, Inc v. Day,* 82 S. Ct. 1432, pp. 1436-1437.

II.

THE BOOK ENTITLED "BONDAGE CABIN" (COUNT ONE), AND THE MOTION PICTURE FILM ENTITLED "THE COUNT" (COUNT TWO), ARE NOT OBSCENE AS A MATTER OF LAW, BUT RATHER ARE CONSTITUTIONALLY PROTECTED MATERIALS.

Penal Code §*311.2* proscribes only obscene matter. If the underlying matter is not obscene, then no matter what else it might be, no crime has been committed and the material is then protected by the First Amendment to the Constitution of the United States and Article I, §9 of the Constitution of the State of California.

The California Supreme Court in *Zeitlin v. Arnebergh,* 59 Cal. 2d 901, held, basing its decision on *Roth v. United States,* 354 U.S. 476, and cases following it, that only that which is designated as "hard-core pornography" falls outside of the constitutional protection.

In *Zeitlin,* the court made this pronouncement twice:

> "This decision and others of the United States Supreme Court, we think, impliedly draw a line of constitutional protection around all material except that which has been described as hard-core pornography." (pp. 911-912)

and again:

> "By employing the term 'utterly' the Legislature indicated its intention to give legal sanction to all material relating to sex except that which was *totally* devoid of social importance. The only material that falls into the latter category is hard-core pornography." (p. 920)

What then, is obscenity? The modern day definition had its genesis in *Roth*. In wrestling with the problem of what is obscenity the Solicitor-General of the United States equated it with hard-core pornography and described it as follows: (Brief for the United States, pp. 37-38, *United States v. Roth*, 354 U.S. 476 [1957]):

> "This is commercially produced material in obvious violation of present law. . . . This material is manufactured clandestinely in this country or abroad and smuggled in. There is no desire to portray the material in pseudoscientific or 'arty' terms. The production is plainly 'hard-core' pornography, of the most explicit variety, devoid of any disguises.
>
> "Some of this pornography consists of erotic objects. There are also large number of black and white photographs, individually, in sets and in booklet form, of men and women engaged in every conceivable form of normal and abnormal sexual relations and acts. There are small printed pamphlets or books, illustrated with such photographs, which consist of stories in simple, explicit words of sexual excesses of every kind, over and over again. No one would suggest that they had the slightest literary merit or were intended to have

any. There are also large numbers of 'comic books', especially drawn for the pornographic trade, which are likewise devoted to explicity illustrated incidents of sexual activity, normal or perverted. . . . It may be said that most, if not all, of this type of booklet contain drawings not only of normal fornication but also of perversions of various kinds.

"The worst of the 'hard-core' pornographic materials now being circulated are the motion picture films. These films, sometimes of high technical quality, sometimes in color, show people of both sexes engaged in orgies which again include every form of sexual activity known, all of which are presented in a favorable light. The impact of these pictures on the viewer cannot easily be imagined. No form of incitement to action or to excitation could be more explicit or more effective."

Thus, we may assume that the Supreme Court of the United States in *Roth* impliedly adopted the description given obscenity by the Solicitor General himself. The test of obscenity, therefore, as contained in *Roth* was confirmed by every single decision involving obscenity from that date to the present time.

It is strongly urged that if the material which is the subject matter of the instant case is compared with the description of and requisite elements of the test of obscenity enunciated in Roth, Zeitlin, and all subsequent cases, it becomes manifest that the instant material is not obscene, as a matter of law. If the material is not obscene, then appellant has committed no violation of §311.2 of the Penal Coe of which he stands

charged. If the material herein involved is not obscene as a matter of law, no jury or any body or court could have reasonable or probable cause, or any cause, to believe it to be obscene. The findings of obscenity are, as Mr. Justice Tobriner tells us in *Zeitlin* (p. 910) "a constitutional fact."

It is most important to note that in every matter coming before the United States Supreme Court since its decision in *Roth,* wherein the United States Supreme Court has granted certiorari or noted jurisdiction, the finding or judgment of obscenity has been reversed or upset; with the exception only of *Ginzburg v. United States,* 86 S. Ct. 942, and *Mishkin v. State of New York,* 86 S. Ct. 958, involving issues not herein involved. A list of the cases in which the Supreme Court has reversed obscenity findings are as follows:

One, Inc. v. Olesen, 355 U.S. 371;

Times Film Corp. v. Chicago, 365 U.S. 43;

Sunshine Book Co. v. Summerfield, 355 U.S. 372;

Kingsley International Pictures Corp. v. Regents, 360 U.S. 684;

Manuel Enterprises, Inc. v. Day, 370 U.S. 478;

Jacobellis v. Ohio, 84 S. Ct. 1676;

Tralines v. Gerstein, 84 S. Ct. 1676;

Grove Press v. Gerstein, 84 S. Ct. 190; and

A Book, etc., v. Attorney General of the Commonwealth of Massachusetts (Fanny Hill case) 86 S. Ct. 975.

The clear purport of all decisions of the United States Supreme Court since *Roth* indicates that the

court clearly meant what it said in *Roth* about "keeping the door tightly closed and opened only the slightest crack." (*Roth v. United States,* 354 U.S. 476, at 488).

In addition to the foregoing authorities, an opinion by the Superior Court of the State of California for the County of Los Angeles, in *People v. Zentner,* et al (Nov. 4, 1966), written by Judge Kenneth Holland, is most illuminating and, the appellant submits, dispositive as to what constitutes illegal pornography under §311.2.

III.

THE ADVERTISING MATERIAL WHICH IS THE SUBJECT MATTER OF COUNT THREE CANNOT AS A MATTER OF LAW VIOLATE SECTION 311.5 OF THE PENAL CODE.

§311.5 says:

> "Advertising or promoting sale or distribution; solicitation.
>
> "Every person who writes or creates advertising or solicits anyone to publish such advertising or otherwise promotes the sale or distribution of matter represented or held out by him to be obscene, is guilty of a misdemeanor."

The plain meaning of the statute is that in order to constitute a violation thereof, the advertising material involved must clearly and explicitly offer obscene material. If the advertising brochure does not offer obscene material, no violation of §311.5 can occur. The material advertised is in no way connected with a viola-

tion of §311.5. It is only the advertising material itself which can constitute a violation of the statute. In other words, and to simply state the proposition, the appellant must advertise material which he represents to be obscene; and in order to do that, he must represent that his material is obscene as defined in §311(a) of the Penal Code.

§311(a) defines obscenity as follows:

> "'Obscene' means that to the average person, applying contemporary standards, the predominant appeal of the matter, taken as a whole, is to prurient interest, i.e., a shameful or morbid interest in nudity, sex, or excretion, which goes substantially beyond customary limits of candor in description or representation of such matters and is matter which is utterly without redeeming social importance."

We must note that the Supreme Court of the State of California in *Zeitlin v. Arnebergh,* 59 Cal. 2d 901, interpreted the above definition of obscenity as being equal to or the same as "hard-core pornography" (*Zeitlin,* p. 920)

It is respectfully submitted that the advertising brochure herein involved is not capable of being found to represent that it offers for sale material which is obscene under the law of this State, as enunciated in *Zeitlin.*

It is therefore respectfully submitted that the advertising material herein involved does not and cannot vio-

late §311.5 of the Penal Code of the State of California as a matter of law.

The latest case which interprets §311.5 and enunciates how it should be applied is the case decided by the Appellate Department of the Superior Court of the State of California for the County of Los Angeles on Setpember 20, 1966, in *People v. Amslow,* etc. CR A 6960. Since that decision was rendered, the Appellate Department certified the issues involved to the District Court of Appeals for opinion by them. The District Court of Appeals refused to accept the certification and said opinion thereby becomes the law binding upon the court.

A plain reading of that decision makes crystal clear that the correct legal interpretation of P.C. §311.5 requires that to sustain a conviction, the defendant must through the advertising brochure "solicit other persons *to promote* the sale or distribution of the material advertised, and that such solicitation must not only solicit others to promote the sale and distribution of the material, but must also require that the recipient who promotes the sale of the material represents it (the material) as obscene."

It is obvious, therefore, that the advertising brochure involved in the instant case does not solicit the recipient of the brochure to promote the material advertised, and obviously it does not either solicit the recipient to not only promote the sale or distribution of the material, but also at the same time hold the material out as being obscene. This alone is sufficient reason for finding that advertising material herein cannot be within the purview of §311.5 as a matter of law.

IV

THE QUESTIONS OF LAW INVOLVED IN THE INSTANT CASE ARE OF GREAT IMPORTANCE AND INVOLVE THE CONSTITUTIONAL PROTECTION OF FREEDOM OF EXPRESSION AND SPEECH AS CONTAINED IN AMENDMENTS ONE AND FOURTEEN OF THE UNITED STATES CONSTITUTION AND ARTICLE ONE §1 OF THE CALIFORNIA STATE CONSTITUTION.

No authority is needed for the basic proposition that constitutionally guaranteed freedoms are matters of utmost importance.

Since the decision by the United States Supreme Court in *Roth* in 1957, the courts of this country and of this state have wrestled with the problem of what material fell within the definition of obscenity as outlined in *Roth*. Cases came up holding that nudity per se were not obscenity. Cases came up holding that sex per se was not obscenity. Finally, in our own state, in the *Zeitlin* decision, the Supreme Court of California identified obscene material as being only that which is "hard core pornography". This now leaves us to wrestle with what is hard core pornography. What exact material is proscribed as being obscene and not entitled to the protection of the First and Fourteenth Amendments of the Constitution of the United States and Article One §9 of the California State Constitution?

V

THERE WAS ABSOLUTELY NO EVIDENCE FROM WHICH THE JURY COULD FIND THE REQUISITE ELEMENTS OF THE TEST OF OBSCENITY AS ENUNCIATED IN §311 (a) OF THE PENAL CODE; I.E., NO CORPUS DELICTI WAS ESTABLISHED.

§311 (a) of the Penal Code reads as follows:

> "'Obscene' means that to the average person, applying contemporary standards, the predominant appeal of the matter, taken as a whole, is to prurient interest, i.e., a shameful or morbid interest in nudity, sex, or excretion, which goes substantially beyond customary limits of candor in description or representation of such matters, and is matter which is utterly without redeeming social importance."

Breaking this definition down into its essential elements, we can see that it is multipartite in composition, which the elements breaking down as follows:

1. To the average person
2. Applying contemporary standards
3. The predominant appeal of the matter, taken as a whole,
4. Is to prurient interest, i.e., a shameful or morbid interest in nudity, sex, or excretion
5. Which goes substantially beyond customary limits of candor in description or representation of such matters.
6. And is matter which is utterly without redeeming social importance.

There is no question that all of the above elements of obscenity must be proven beyond a reasonable doubt by the prosecution, and that there must be a coalescence of each and every one of these elements in order for a tryer of fact to be able to make a finding of obscenity. *Landau v. Fording,* 245 ACA 872; *U.S. v. Klaw,* 350 Fed 2d, 155.

The requirement of proof is more sensitive and more particularly required when the alleged obscenity has to do with deviant groups. (Klaw, p. 166, "and if proof of prurient stimulation and response is generally important, it is particularly important and necessary when the prurient interest may be that of a deviant segment of society, whose reactions are hardly a matter of common knowledge.") There is no rule of res ipsa loquitur in the field of obscenity where first amendment privileges are involved. Where such is done, the only conclusion that can be reached is that the jurors would be left to speculate, and this the First Amendment to the United States Constitution would not countenance. As was stated by the *Klaw* Court at p. 167:

> "Whatever the value of mere 'autoptical' evidence in other contexts, it should not readily be countenanced in this area. Otherwise, too easily the government's test might allow a jury to equate patent offensiveness to prurient appeal, thus obliterating the conjunction that has been thought indispensable."

Here again, the Court makes reference to the fact that prurient appeal alone is not sufficient. In other words, the *Klaw* court states at p. 164:

> "In addition to its appeal to 'prurient interest', proscribable 'obscenity' must be 'utterly without redeeming social importance'.—It must go 'substantially' beyond the customary limits of candor in description or representation'—It must be characterized by 'patent offensiveness'.—In brief, it is 'hard-core pornography'—"

The Klaw Court again reiterates the necessity for the conjunction of several elements at p. 164, where they say:

> "Thus, material is proscribable 'obscenity' or hard-core pornography, if it has the requisite prurient appeal, *and* if it so exceeds customary candor as to be patently offensive, *unless* it has *any* redeeming social importance." They go on to say: "However, the absence of artistic or literary value or other value of social consequence does not, without more, lead to a finding of proscribable 'obscenity'. Such qualities would merely insulate what otherwise might be proscribable due to its offensiveness and prurient appeal."

Summing up, each element must come together at one time and be proved by the prosecution, by evidence, in order for a finding of obscenity to be had of any given piece of material. A search of the record in the instant case will show an utter lack of such evidence. As a matter of fact, the only evidence offered by the People was the testimony of Dr. Marcus Crahan, and

his evidence related only to whether or not there was an appeal to the prurient interest of a deviant group. No other evidence as to any of the other requisite elements was offered by the People.

Therefore, appellant respectfully submits that no corpus delecti was established at any time.

Dated: June 14, 1967.

Respectfully submitted,

/s/ By Burton C. Jacobson
Burton C. Jacobson
Attorneys for Defendant
and Appellant.

DECLARATION OF BURTON C. JACOBSON IN SUPPORT OF PETITION FOR REHEARING AND APPLICATION FOR CERTIFICATION TO THE DISTRICT COURT OF APPEALS

Burton C. Jacobson declares that he is an attorney-at-law licensed to practice before all courts of the State of California, and that he is one of the attorneys for defendant and appellant, SAMUEL RATNER.

He hereby certifies that the foregoing petition for rehearing and application for certification to the District Court of Appeals is submitted in good faith and not for purposes of delay.

I declare under penalty of perjury that the foregoing is true and correct.

Dated: June 14, 1967.

/s/ By Burton C. Jacobson

APPENDIX D.

Rule 63. Certification.

(a) [*Authority to make*] The superior court on application of a party or on its own motion may certify that the transfer of a case to the District Court of Appeal appears necessary to secure uniformity of decision or to settle important questions of law. Such certification may be made by a majority of the judges of the appellate department, or, in a county having no appellate department, by the judge hearing the appeal. When there was a trial in the superior court, the judge who tried the case may make such certification. If any judge of the appellate department who participated in the decision is unable to act on the certification, then a judge designated or assigned to the appellate department by the chairman of the Judicial Council may act in his place. If the judge who heard the appeal or tried the case is unable to act, then the certification may be made by a judge designated by the presiding judge or, if there be no presiding judge, by any judge of the court.

APPENDIX E.

In the Court of Appeal of the State of California, Second Appellate District, Division .....

People of the State of California, Plaintiff and Respondent, v. Samuel Ratner, Defendant and Appellant. 2d Cr. No. 13813. Superior Court No. CR A 7261 Trial Court No. M35295.

Filed: July 26, 1967.

THE COURT:

The record on transfer in the above entitled cause having been filed in this Court on July 10, 1967, pursuant to certification made by the Appellate Department of the Superior Court of Los Angeles County, and this Court having considered the matter of whether such cause should be transferred to this Court for hearing and decision, now, therefore, it is hereby ordered that such transfer be and it hereby is denied.

APPENDIX F.

Defendant's Designation of Record on Appeal, and Statement on Appeal.

In the Municipal Court of El Monte Judicial District, County of Los Angeles, State of California.

The People of the State of California, Plaintiff, vs. Samuel Ratner, Defendant. No. M 35395.

COMES NOW the defendant, SAMUEL RATNER, and, pursuant to Rules 183 and 184 of the California Judicial Council Rules on Appeal from Municipal Courts in Criminal Cases, hereby designates the record and files his statement on appeal.

Designation of Record on Appeal:

1. The Amended Complaint
2. Demurrer to the Complaint and Order of the Court thereon.
3. The Clerk's Transcript
4. The Reporter's Transcript
5. All written instructions given
6. All written instructions requested, refused or modified
7. All minutes of the Court relating to the action
8. The Jury Verdict
9. The Motion In Arrest of Judgment or in the alternative, the Motion for a New Trial including Points and Authorites
10. All exhibits, instructions, orders, papers and documents refered to or identified in such papers or transcripts as provided in Rule 184
11. The Judgment of the Court
12. The Notice of Appeal filed November 29, 1966
13. This Statement on Appeal

Statement on Appeal

The grounds upon which defendant relies:

I.

The book entitled "Bondage Cabin" upon which defendant was convicted in Count One of the amended complaint is not obscene as a matter of law, but rather is constitutionally protected material.

II.

The motion picture film "The Count" upon which defendant was convicted in Count Two of the amended complaint is not obscene as a matter of law, but rather is constitutionally protected material.

III.

The advertising material which is the subject matter of Count Three cannot as a matter of law violate Section 311.5 of the Penal Code.

IV.

The Court erred in failing to dismiss the action on the grounds that the material was constitutionally protected as a matter of law.

V.

The Court erred by giving improper instructions to the Jury particularly with regard to the California rule of law as enunciated in *Zeitlin v. Arnebergh,* 59 Cal. 2d 902, to wit: that only that which constitutes "hard-core pornography" may constitutionally be prohibited in California as being obscene; and in giving erroneous instructions concerning the Supreme Court's interpretation of the law of the State of New York in the "Mishkin" decision (*Mishkin v. State of New York,* 86 Sup Ct. 958).

VI.

There was no evidence from which the Jury could find the requisite elements of the test of obscenity as enunciated in 311 (a) of the Penal Code.

VII.

There was no evidence from which the Jury could find that a violation of Section 311.5 of the Penal Code had been made by the material involved in Count Three of the amended complaint.

VIII.

The Court erred in denying defendant's Motion in Arrest of Judgment and denying defendant's Motion for a New Trial.

IX.

No corpus delecti was established at any time during the trial as to any of the counts of the amended complaint.

X.

There was no evidence from which the jury could find that the defendant had knowledge that the material was obscene as required by Section 311 (e) of the Penal Code, or that the required element of scienter was established by any evidence at all.

XI.

That Sections 311.2 and 311.5 of the Penal Code are unconstitutional as being vague and indefinite, and being incapable of giving the required notice as to what constitutes a violation either to the general public, and more particularly, the defendant.

Dated:

ATKINS & JACOBSON

BY.....

Burton C. Jacobson

Attorneys for Defendant

APPENDIX G.

Appellant's Opening Brief.

Superior Court of the State of California, for the County of Los Angeles, Appellate Department.

People of the State of California, Plaintiff and Respondent, vs. Samuel Ratner, Defendant and Appellant. No. CR A 7261.

STATEMENT OF THE CASE

This is the case in which there was a three count amended complaint charging the respondent on the first two counts with violating §311.2 of the Penal Code, to wit, distribution of obscene matter, and charging the respondent with violating §311.5 of the Penal Code, to wit, advertising to promote obscenity.

After a lengthy jury trial in the Municipal Court of El Monte Judicial District, the Honorable John K. Otis, Judge presiding, the defendant was convicted of the three counts contained in said amended complaint. The defendant did timely file his notice of appeal and did designate his record and make a statement on appeal, heretofore filed.

I.

THE BOOK ENTITLED "BONDAGE CABIN" (COUNT ONE), AND THE MOTION PICTURE FILM ENTITLED "THE COUNT" "COUNT TWO), ARE NOT OBSCENE AS A MATTER OF LAW, BUT RATHER ARE CONSTITUTIONALLY PROTECTED MATERIALS.

Penal Code §311.2 proscribes only obscene matter. If the underlying matter is not obscene, then no matter what else it might be, no crime has been committed

and the material is then protected by the First Amendment to the Constitution of the United States and Article I, §9 of the Constitution of the State of California.

The California Supreme Court in *Zeitlin v. Arnebergh,* 59 Cal. 2d 901, held, basing its decision on *Roth v. United States,* 354 U.S. 476, and cases following it, that only which is designated as "hard-core pornography" falls outside of the constitutional protection. In *Zeitlin,* the court made this pronouncement twice:

> "This decision and others of the United States Supreme Court, we think, impliedly draw a line of constitutional protection around all material except that which has been described as hard-core pornography." (pp. 911-912)

and again:

> "By employing the term 'utterly' the Legislature indicated its intention to give legal sanction to all material relating to sex except that which was *totally* devoid of social importance. The only material that falls into the latter category is hard-core pornography." (p. 920)

What then, is obscenity? The modern day definition had its genesis in *Roth.* In wrestling with the problem of what is obscenity the Solicitor-General of the United States equated it with hard-core pornography and described it as follows: (Brief for the United States, pp. 37-38, *United States v. Roth,* 354 U.S. 476 [1957]):

> "This is commercially produced material in obvious violation of present law. . . . This material is manufactured clandestinely in this country or abroad and smuggled in. There is no desire to

portray the material in pseudo-scientific or 'arty' terms. The production is plainly 'hard-core' pornography, of the most explicit variety, devoid of any disguises.

"Some of this pornography consists of erotic objects. There are also large number of black and white photographs, individually, in sets, and in booklet form, of men and women engaged in every conceivable form of normal and abnormal sexual relations and acts. There are small printed pamphlets of books, illustrated with such photographs, which consist of stories in simple, explicit words of sexual excesses of every kind, over and over again. No one would suggest that they had the slightest literary merit or were intended to have any. There are also large numbers of 'comic books', specially drawn for the pornographic trade, which are likewise devoted to explicitly illustrated incidents of sexual activity, normal or perverted. . . . It may be said that most, if not all, of this type of booklets contain drawings not only of normal fornication but also of perversions of various kinds.

"The worst of the 'hard-core' pornographic materials now being circulated are the motion picture films. These films, sometimes of high technical quality, sometimes in color, show people of both sexes engaged in orgies which again include every form of sexual activity known, all of which are presented in a favorable light. The impact of these pictures on the viewer cannot easily be imagined. No form of incitement to action or to excitation could be more explicit or more effective."

Thus, we may assume that the Supreme Court of the United States in *Roth* impliedly adopted the description given obscenity by the Solicitor General himself. The test of obscenity, therefore, as contained in *Roth* was confirmed by every single decision involving obscenity from that date to the present time.

It is strongly urged that if the material which is the subject matter of the instant case is compared with the description of and requisite elements of the test of obscenity enunciated in Roth, Zeitlin, and all subsequent cases, it becomes manifest that the instant material is not obscene, as a matter of law. If the material is not obscene, then defendant has committed no violation of §311.2 of the Penal Code of which he stands charged. If the material herein involved is not obscene as a matter of law, no jury or any body or court could have reasonable or probable cause, or any cause, to believe it to be obscene. The findings of obscenity are, as Mr. Justice Tobriner tells us in *Zeitlin* (p. 910) "a constitutional fact."

It is most important to note that in every matter coming before the United States Supreme Court since its decision in *Roth,* wherein the United States Supreme Court has granted certiorari or noted jurisdiction, the finding or judgment of obscenity has been reversed or upset; with the exception only of *Ginzburg v. United States,* 86 S. Ct. 942, and *Mishkin v. State of New York,* 86 S. Ct. 958, involving issues not herein

involved. A list of the cases in which the Supreme Court has reversed obscenity findings are as follows:

One, Inc. v. Olesen, 355 U.S. 371;
Times Film Corp. v. Chicago, 365 U.S. 43;
Sunshine Book Co. v. Summerfield, 355 U.S. 372;
Kingsley International Pictures Corp. v. Regents, 360 U.S. 684;
Manuel Enterprises, Inc. v. Day, 370 U.S. 478;
Jacobellis v. Ohio, 84 S. Ct. 1676;
Tralins v. Gerstein, 84 S. Ct. 1903;
Grove Press v. Gerstein, 84 S. Ct. 190; and
A Book, etc v. Attorney General of the Commonwealth of Massachusetts (Fanny Hill case) 86 S. Ct. 975.

The clear purport of all decisions of the United States Supreme Court since *Roth* indicates that the court clearly meant what it said in *Roth* about "keeping the door tightly closed and opened only the slightest crack." (*Roth v. United States,* 354 U.S. 476, at 488).

In addition to the foregoing authorities, an opinion by the Superior Court of the State of California for the County of Los Angeles, in *People v. Zentner, et al.* (Nov. 4, 1966), written by Judge Kenneth Holland, is most illuminating and, the defendant submits, dispositive as to what constitutes illegal pornography under §311.2. A copy of said memorandum opinion is attached hereto as APPENDIX A to this brief.

II

THE ADVERTISING MATERIAL WHICH IS THE SUBJECT MATTER OF COUNT THREE CANNOT AS A MATTER OF LAW VIOLATE SECTION 311.5 OF THE PENAL CODE.

§311.5 says:

> "Advertising or promoting sale or distribution; solicitation.
>
> "Every person who writes or creates advertising or solicits anyone to publish such advertising or otherwise promote the sale or distribution of matter represented or held out by him to be obscene, is guilty of a misdemeanor."

The plain meaning of the statute is that in order to constitute a violation thereof, the advertising material involved must clearly and explicitly offer obscene material. If the advertising brochure does not offer obsene material, no violation of §311.5 can occur. The material advertised is in no way connected with a violation of §311.5. It is only the advertising material itself which can constitute a violation of the statute. In other words, and to simply state the proposition, the defendant must advertise material which he represents to be obscene; and in order to do that, he must represent that his material is obscene as defined in §311(a) of the Penal Code.

§311(a) defines obscenity as follows:

> "(a) 'Obscene' means that to the average person, applying contemporary standards, the predominant appeal of the matter, taken as a whole, is to prurient interest, i.e., a shameful or morbid interest in nudity, sex, or excretion, which goes

substantially beyond customary limits of candor in description or representation of such matters and is matter which is utterly without redeeming social importance."

We must note that the Supreme Court of the State of California in *Zeitlin v. Arnebergh,* 59 Cal. 2d 901, interpreted the above definition of obscenity as being equal to or the same as "hard-core pornography" (*Zeitlin,* p. 920).

It is respectfully submitted that the advertising brochure herein involved is not capable of being found to represent that it offers for sale material which is obscene under the law of this State, as enunciated in *Zeitlin.*

It is therefore respectfully submitted that the advertising material herein involved does not and cannot violate §311.5 of the Penal Code of the State of California as a matter of law.

The latest case which interprets §311.5 and enunciates how it should be applied is the case decided by the Appellate Department of the Superior Court of the State of California for the County of Los Angeles on September 20, 1966, in *People v. Amslow, etc.* CRA 6960. A copy of said opinion is attached hereto as APPENDIX B.

Since that decision was rendered, the Appellate Department certified the issues involved to the District Court of Appeals for opinion by them. The District Court of Appeals refused to accept the certification and said opinion thereby becomes the law binding upon the court.

A plain reading of that decision makes crystal clear that the correct legal interpretation of P.C. §311.5 re-

quires that to sustain a conviction, the defendant must through the advertising brochure "solicit other persons *to promote* the sale or distribution of the material advertised, and that such solicitation must not only solicit others to promote the sale and distribution of the material, but must also require that the recipient who promotes the sale of the material represents it (the material) as obscene."

It is obvious, therefore, that the advertising brochure involved in the instant case does not solicit the recipient of the brochure to promote the material advertised, and obviously it does not either solicit the recipient to not only promote the sale or distribution of the material, but also at the same time hold the material out as being obscene. This alone is sufficient reason for finding that advertising material herein cannot be within the purview of §311.5 as a matter of law.

III

THE TRIAL COURT ERRED BY GIVING IMPROPER INSTRUCTIONS TO THE JURY.

A. The Court refused to give the rule of law enunciated in *Zeitlin v. Arnebergh,* 59 Cal. 2d 902, to wit: that only that which constitutes "hard-core pornography" may constitutionally be prohibited in California as being obscene. There can be no question since the decision of the United States Supreme Court in *Mishkin v. New York,* 86 S Ct. 958, that a State is free to adopt a narrower interpretation of the term obscene than was adopted by the United States Supreme Court in *Roth v. United States,* 354 U.S. 476. Certainly, therefore, our Supreme Court in the *Zeitlin* case did adopt a more severe standard when they adopt-

ed the "hard-core pornography" test. Since defendant feel this is a point of utmost importance, he was nonetheless forbidden from arguing the same by reason of the Court's refusal to give a Zeitlin "hard-core pornography" instruction. There can be no doubt that this was highly prejudicial and detrimental to the effective defense of the defendant, particularly at the time of argument when no "hard-core pornography" instruction was to be given. Therefore, appellant submits that it was error for the Court to refuse instructions numbers 35 and 36 at the time of trial.

B. 1. The Court erred in giving any "Mishkin" type of instruction. It is the defendant's position that the rules and law enunciated in *Mishkin v. New York,* 86 S Ct 958, are inapplicable in a prosecution in the State of California. The Supreme Court in the *Mishkin* case interpreted §1141 of the Penal Code of the State of New York, which specifically concerns sadistic and masochistic material. The Supreme Court of the United States held that such delineations were not impermissibly vague when the Courts of the State of New York in their decisions held such terms to be synonomous with obscene. (Mishkin, 86 S Ct, at p. 62). It is most important to note that there have been no decisions in the State of California making the definition of obscenity as it is contained in §311(a) of the Penal Code of this State applicable or synonymous with "sadistic" and/or "masochistic". §311(a) of the Penal Code in no way, shape or form intends to, aims at or attempts to include sadistic or masochistic material, requiring an interpretation that this is synonomous with obscenity in order to meet constitutional safeguards. It is not the function or duty of the

Courts to give strained meaning to the obvious legislative intent of this State in the passage of §311(a) of the Penal Code, which specifically states as a test of obscenity only that material which would appeal to the prurient interest of an average person. If the legislature of the State of California intended to cover sadistic or masochistic material, certainly they would have said so in plain and no uncertain terms as did the legislature of the State of New York. Their silence in that regard can only be construed to mean that they did not intend that such types of material be covered within the proscribes of the California obscenity statute.

B. 2. Assuming, arguendo, that the *Mishkin* rule applies to the State of California, the Court improperly instructed as to the Mishkin rule when it modified defendant's proposed instruction number 31, and thereby eliminated the words "containing an average member". Since our Penal Code in §311(a) requires a prurient appeal test to the average person, even if we adjust the average person requirement to an average well-defined deviant group, the use of the word average and its importance to the definition of §311(a) cannot be lightly overlooked. Again, appellant feels that his argument and case in chief was substantially prejudiced by being unable to argue the lack of proof by the People that there was an average member of any deviant group to which this material had a prurient appeal.

Additionally, the People's instructions numbers 2, 3 and 4, containing certain definitions of sadism, mashochism and flagellation, were given over defendant's objections. There is absolutely no authority in any case that appellant has been able to find in which it was

held proper to give any instruction such as 2, 3 and 4. Appellant contends that the definitions given in said instructions were slanted definitions, aimed at creating bias and prejudice in the minds of the jury since said definitions only gave the sexual connotations to these terms, rather than an unbiased approach to defining the terms involved. It goes without saying that terms such as sadism, masochism, flagellation, etc. have adopted more common meanings without the sexual connotation attached thereto.

Therefore, appellant submits that a highly prejudicial error was committed in giving instructions 2, 3 and 4 to the jury. Appellant further submits that this error was compounded when the Court refused defendant's proposed instructions number 29 and 30, which appellant contends is an accurate statement of the law since deriving pleasure from any particular material is irrelevant and immaterial and in no way connected with the determination of obscenity under the laws of this State.

C. Appellant contends that the Court erred in refusing defendant's proposed instruction number 40 as it related to Count 3 of the complaint pertaining to a violation of the §311.5 of the Penal Code. Appellant contends that defendant's proposed instruction number 40 is an accurate reflection of this Court's construction of §311.5 as contained in the case of *People v. John Amslow, etc.*, CR A 6960, decided by this Court September 20, 1966; and that the failure of the Trial Court to so instruct the jury was prejudicial error.

IV

THERE WAS ABSOLUTELY NO EVIDENCE FROM WHICH THE JURY COULD FIND THE REQUISITE ELEMENTS OF THE TEST OF OBSCENITY AS ENUNCIATED IN §311(a) OF THE PENAL CODE; I.E., NO CORPUS DELECTI WAS ESTABLISHED.

§311(a) of the Penal Code reads as follows:

> "'Obscene' means that to the average person, applying contemporary standards, the predominant appeal of the matter, taken as a whole, is to prurient interest, i.e., a shameful or morbid interest in nudity, sex, or excretion, which goes substantially beyond customary limits of candor in description or representation of such matters and is matter which is utterly without redeeming social importance."

Breaking this definition down into its essential elements, we can see that it is multipartite in composition, with the elements breaking down as follows:

1. To the average person
2. Applying contemporary standards
3. The predominant appeal of the matter, taken as a whole,
4. Is to prurient interest, i.e., a shameful or morbid interest in nudity, sex, or excretion
5. Which goes substantially beyond customary limits of candor in description or representation of such matters
6. And is matter which is utterly without redeeming social importance.

There is no question that all of the above elements of obscenity must be proven beyond a reasonably doubt by the prosecution, and that there must be a coalescence of each and every one of these elements in order for a tryer of fact to be able to make a finding of obscenity. *Landau v. Fording,* 245 ACA 872; *U.S. v. Klaw,* 350 Fed 2d, 155.

The requirement of proof is more sensitive and more particularly required when the alleged obscenity has to do with deviant groups. (Klaw, p. 166, "and if proof of prurient stimulation and response is generally important, it is particularly important and necessary when the prurient interest may be that of a deviant segment of society, whose reactions are hardly a matter of common knowledge."). There is no rule of res ipsa loquitur in the field of obscenity where first amendment privileges are involved. Where such is done, the only conclusion that can be reached is that the jurors would be lfet to speculate, and this the First Amendment to the United States Constitution would not countenance. As was stated by the *Klaw* Court at p. 167: "Whatever the value of mere "autopical" evidence in other contexts, it should not readily be countenanced in this area. Otherwise, too easily the government's test might allow a jury to equate patent offensiveness to prurient appeal, thus obliterating the conjunction that has been thought indispensable."

Here, again, the Court makes reference to the fact that prurient appeal alone is not sufficient. In other words, the Klaw Court states at p. 164: "In addition to its appeal to 'prurient interest', proscribable 'obscenity' must be 'utterly without redeeming social importance'. . . . It must go 'substantially beyond the

customary limits of candor in description or representation' . . . It must be characterized by 'patent offensiveness'. . . . In brief, it is 'hard-core pornography'. . . .

The Klaw Court again reiterates the necessity for the conjunction of several elements at p. 164 where they say. "Thus, material is proscribable 'obscenity' or hard-core pornography, if it has the requisite prurient appeal, *and* if it so exceeds customary candor as to be patently offensive, *unless* it has *any* redeeming social importance." They go on to say: "However, the absence of artistic or literary value or other value of social consequence does not, without more, lead to a finding of proscribable 'obscenity'. Such qualities would merely insulate what might otherwise be proscribable due to its offensiveness and prurient appeal."

Summing up, each element must come together at one time and be proved by the prosecution, by evidence, in order for a finding of obscenity to be had of any given piece of material. A search of the record in the instant case will show an utter lack of such evidence. As a matter of fact, the only evidence offered by the People was the testimony of Dr. Marcus Crahan, and his evidence related only to whether or not there was an appeal to the prurient interest of a deviant group. No other evidence as to any of the other requisite elements was offered by the people.

At this point, appellant wishes to assign as error the allowing of a particularly highly prejudicial line of questioning to the doctor, commencing at line 15, page 277 of the Reporter's Transcript on Appeal, and ending with line 12, page 278, as follows:

"Q Doctor, do one of these people who are deviates who have habit patterns as sadists, mashochists, fla-

gellants, homosexuals, whatever it might be, do a lot of them, are they able, in their daily lives, to suppress their desires to participate in this type of an act?

MR. JACOBSON: I object. It is not material to any of the issues.

THE COURT: Overruled.

THE WITNESS: Yes. They are frequently able to suppress their desires.

BY MR. ALEX:

Q Doctor, from your experience, is there any likelihood that a type of book such as People's Number 4, or the "Bondage Cabin," or "Flagella," and/or the movie, "The Mad Count", or, "The Count," People's Number 5, would this have any—these types of, seeing or reading these types of books and movies, would it have any tendency to cause a person who is a deviate, who usually suppresses his activity, to come out in the open and actually take some overt action in regard to his deviation?

A Yes, I think it would excite his pattern, whatever it might be, by removing some inhibitions that were holding it in control.

MR ALEX: Nothing further. Cross examine."

This question, which was allowed to be asked over defense objection, certainly has no materiality or relevancy to any of the issues of obscenity, since it is not requisite under the law of this State to prove overt conduct as a result of the alleged obscene utterances. Therefore, such a question can only be assumed to have been asked for the purpose of creating bias and prejudice on behalf of the jury, and certainly it is clear from the very nature of the question and answer that such was its obvious result.

Therefore, appellant respectfully submits that no corpus delecti was established at any time.

V

THERE WAS NO EVIDENCE FROM WHICH THE JURY COULD FIND THAT A VIOLATION OF SECTION 311.5 OF THE PENAL CODE HAD BEEN MADE BY THE MATERIAL INVOLVED IN COUNT 3 OF THE AMENDED COMPLAINT; I.E.: NO CORPUS DELECTI WAS ESTABLISHED FOR COUNT 3.

In that regard, appellant incorporates herein by reference its argument as it related to the preceding point for Counts 1 and 2, except that as to Count 3, there was no evidence through any witness or of any type, nature, or description, that the advertising brochure met any of the requisites of §311.5. On that ground, appellant respectfully submits that no corpus delecti was established.

VI

THERE WAS NO COMPETENT EVIDENCE FROM WHICH THE JURY COULD FIND THAT THE DEFENDANT HAD KNOWLEDGE THAT THE MATERIAL WAS OBSCENE AS REQUIRED BY §311(a) OF THE PENAL CODE OR THAT THE REQUIRED ELEMENT OF SCIENTER WAS ESTABLISHED BY ANY COMPETENT EVIDENCE AT ALL.

§311(e) of the Penal Code states:

> "'Knowingly' means having knowledge that the matter is obscene."

An entire search of the record as contained in the Reporter's Transcript on Appeal will reveal to this Honorable Court that the prosecution offered no evidence whatsoever that the defendant, in fact, knew

that any of the material involved was obscene. As a matter of fact, the laborious task of judges, jurors and lawyers in this field would point out that such a determination by a layman is virtually impossible; be that as it may, that is no reason for doing away with that essential requisite.

CONCLUSION

On the basis of all of the foregoing, and on the basis of all of the points raised on appellant's statement on appeal heretofore filed, appellant respectfully submits that the convictions on Counts 1, 2 and 3 in the Municipal Court below should be reversed.

Respectfully submitted,

ATKINS & JACOBSON

By Burton C. Jackson

Attorneys for defendant and appellant.